

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Maine Public Service Company**

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**Docket No. OA08-21**

**NOTICE OF INTERVENTION AND COMMENTS  
OF  
THE MAINE PUBLIC UTILITIES COMMISSION**

The Maine Public Utilities Commission ("MPUC"), by and through counsel, Lisa Fink, State of Maine Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018, and Lisa S. Gast, Duncan, Weinberg, Genzer & Pembroke, P.C., 1615 M Street, NW, Suite 800, Washington, DC 20036, respectfully files this Notice of Intervention and Comments in the above-captioned proceeding regarding the December 7, 2007 filing of the Maine Public Service Company ("MPS"). MPUC's comments are limited to the provisions in Attachment R relating to dispute resolution and cost allocation.

**I. PRELIMINARY STATEMENT**

This Notice of Intervention and Comments is filed pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. §§ 385.211 and 385.214 (2007), and the Commission's December 20, 2007 Notice of Extension of Time.

The persons to whom correspondence, pleadings, and other papers in relation to this proceeding should be addressed and the persons whose names are to be placed on the Commission's official service list are designated as follows pursuant to Rule 203, 18 C.F.R. § 385.203 (2007):

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## **II. NOTICE OF INTERVENTION**

Under Maine law, the MPUC is the state commission designated by statute with jurisdiction over rates and service of electric utilities in the state. *See* 35-A M.R.S.A. § 101 *et seq.* It is, therefore, a “state commission” under the Commission’s regulations, 18 C.F.R. § 1.101(k) (2007). Accordingly, the MPUC hereby gives notice of its intervention pursuant to Rule 214(a)(2), 18 C.F.R. § 385.214(a)(2)(2007).

## **III. BACKGROUND**

### **A. Dispute Resolution**

On December 7, 2007, MPS submitted, pursuant to Section 206 of the Federal Power Act, 16 U.S.C. § 824e and in compliance with Order 890,<sup>1</sup> “Attachment R” which sets forth MPS’s transmission planning process. Order 890 requires, among other things, the transmission provider (in this case, MPS) to set forth a dispute resolution process applicable to transmission planning. The Commission viewed the purpose of the dispute resolution process as providing “a means for parties to resolve all disputes related to the Final Rule’s planning process before turning to the Commission.” Order 890 at P 501. The Commission encouraged the development of a three-step dispute resolution process

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<sup>1</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs., Regulations Preambles ¶ 31,241 (2007).

consisting of negotiation, mediation and arbitration. However, the Commission did not mandate this approach. Further, the Commission emphasized that the process could not abrogate any rights the transmission provider or affected parties may have under FPA Section 206 to file complaints with the Commission. Order 890 at P 503.

MPS's Order 890 submittal provides for a three-step process of negotiation, mediation and arbitration. While the Attachment R provisions state that parties retain their Section 206 rights, it limits the opportunity to file complaints during the negotiation and mediation stages.

The arbitration provisions of Attachment R adopt the MPS OATT's arbitration provisions. These provisions set forth the process for arbitration and also provide that the arbitration decision is final and binding upon the parties. *See* MPS OATT §§ 12.2-12.3.

## **B. Cost Allocation**

Order 890 sets forth certain principles for cost allocation of new transmission projects to provide greater certainty and support for the construction of new transmission infrastructure. *See* Order 890 at P 557-561. FERC set forth the following principles:

First, we consider whether a cost allocation proposal fairly assigns costs among participants, including those who cause them to be incurred and those who otherwise benefit from them. Second, we consider whether a cost allocation proposal provides adequate incentives to construct new transmission. Third, we consider whether the proposal is generally supported by state authorities and participants across the region.

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These three factors are interrelated. For example, a cost allocation proposal that has broad support across a region is more likely to provide adequate incentives to construct new infrastructure than one that does not. The states, which have primary transmission siting authority, may be reluctant to site regional transmission projects if they believe the costs are not being allocated fairly. Similarly, a proposal that allocates costs fairly to participants who benefit from them is more likely to support new

investment than one that does not. Adequate financial support for major new transmission projects may not be obtained unless costs are assigned fairly to those who benefit from the project.

*Id.* at P 559-560. Finally, FERC stressed the importance of having a methodology that is understood upfront to reduce the potential for litigation of cost allocation and to provide certainty to the project sponsors. *See id.* at P 561.

MPS's compliance filing provides the following cost allocation provisions:

**9.1 Economic and Reliability Projects.** The costs of reliability projects that are identified in the planning studies shall be allocated to all Transmission Customers on a load-ratio share basis consistent with Attachment J to the Tariff. The cost of economic projects that specifically benefit individual customers that are identified in the planning studies shall be allocated to the entities that benefit from the projects.

MPS Attachment R, Section 9.1. Attachment R also provides that MPS, with input from the Planning Advisory Group, will determine which projects are reliability projects and which are economic projects. *See* Section 9.3 of Attachment R. There is no definition set forth for what constitutes an "economic project" or a "reliability project" or criteria for determining which category the project falls into. There are also no criteria for determining who constitute the "beneficiaries" of projects.

#### **IV. COMMENTS**

**A. Dispute Resolution Provisions Should Be Modified To Eliminate Binding Arbitration As An Option And To Clarify That There Are No Restrictions On The Exercise Of Any Interested Person's Rights Under Section 206 Of The FPA.**

In Order 890-A,<sup>2</sup> the Commission affirmed the importance of transmission planning:

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<sup>2</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, 121 FERC ¶ 61,297 (2007) ("Order 890-A").

Transmission planning is critical because it is the means by which customers consider and access new sources of energy and have an opportunity to explore the feasibility of non-transmission alternatives. It is therefore vital for each transmission provider to open its transmission planning process to customers, coordinate with customers regarding future system plans, and share necessary planning information with customers.

Order 890-A at P 4. Dispute Resolution mechanisms, such as binding arbitration, are typically used for such matters as billing disputes and other issues that have limited participants and impacts. However, binding arbitration may not be ideally suited to disputes about transmission planning which affect a wide range of consumers, regulators, transmission owners, generators and competitive suppliers. Moreover, binding arbitration would prevent state regulator participation in the process.<sup>3</sup> Because of the importance of state regulator participation in the planning process, it would be inappropriate to exclude state regulators from resolution of disputes relating to transmission planning. Further, binding arbitration on an issue that a state regulator (or other entity that does not participate in binding arbitration) seeks to bring to the Commission as a complaint could serve to limit these non-participating parties' Section 206 rights. In fact, MPS's tariff provides that a complaint may not be filed at the arbitration stage of the dispute resolution process. This provision, on its face, limits parties' Section 206 rights. Finally, even if a complaint could go forward and not be affected at all by the binding arbitration, having a litigated proceeding following upon, or

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<sup>3</sup> For example, under 35-A M.R.S.A. § 3132, transmission projects of 69 kV or more must receive approval from the MPUC prior to the construction of the line. In approving or disapproving all or a portion of the proposed line, the MPUC must find that a need exists. To the extent, that binding arbitration determines an issue related to the need for the transmission line, the MPUC could not be bound by the arbitration because the matter must be adjudicated in accordance with Maine statute, MPUC regulations and the Maine Administrative Procedure Act.

simultaneous to, binding arbitration calls into question the efficiency of binding arbitration as it relates to transmission planning.

ISO New England, Inc. (“ISO-NE”) addressed the concerns of state regulators by eliminating binding arbitration from the dispute resolution process. ISO-NE provides the following explanation of its process and the reason for eliminating binding arbitration from the dispute resolution process:

The three-step dispute resolution process is specified in Section 12.6 of Attachment K. As a first step, that process requires the disputing parties to attempt to resolve the dispute through discussions at PAC. This step provides an opportunity for participation by stakeholders that share the concerns raised, may be impacted by the outcome of the dispute resolution process, or have information that may be useful to the resolution of the dispute. Furthermore, because of the role and expertise of the PAC, it is appropriate for a resolution of a dispute that relates to the regional system planning process to be discussed and resolved in that forum. Next, the process provides that, in the event resolution is not achieved through PAC, the parties will engage in good-faith negotiations among authorized senior representatives. Finally, the dispute resolution process allows for the parties, by mutual agreement, to engage in a form of alternative dispute resolution process, not to include *binding* arbitration.

Order No. 890 and the Commission staff’s White Paper suggest that the final step of the three-step dispute resolution process be binding arbitration. The draft Attachment K posted on September 14, 2007, in accordance with the July 27 Order, included binding arbitration provisions. In the ongoing consultations with numerous state regulators in the region, a significant and appropriate concern was raised with regard to mandating or permitting the use of binding arbitration. The concerns of the state regulators were based on potential legal prohibitions for states to participate in binding arbitration and the fact that if such participation is barred, very meaningful input into critical regional system planning decisions could be lost due to the absence of state regulators in that process. Given these concerns, ISO-NE and NEPOOL worked closely with various regulators from the New England States and unanimously agreed to exclude binding arbitration as a means of dispute resolution. This elimination, however, should not harm the regional system planning process in New England or hamper the ability to effectively resolve disputes. With the vigorous PAC process, higher level negotiation and the availability of other means of alternative dispute resolution, all of New

England constituents have ample means to resolve disputes before they might be brought to the Commission for resolution.

December 7, 2007 Transmittal Letter to Amendments to the ISO New England, Inc Markets and Service Tariff in Compliance with Order 890, Docket No.OA-58. ISO-NE also noted that this process did not preclude parties from initiating a complaint under the Federal Power Act.

The MPUC recommends that the Commission order MPS to adopt similar provisions to that of ISO-NE to address the concerns addressed herein. Specifically, MPS should be ordered to remove binding arbitration from the dispute resolution provisions of Schedule R and remove limitations on parties' ability to initiate complaints under Section 206 of the FPA.

**B. MPS May Wish to Consider Future Clarifications and Revisions to Its Transmission Cost Allocation Provisions.**

While it may be clear from the planning studies and meetings which projects are reliability upgrades and which are economic, it is possible that MPS's determination may be questioned. To the degree that this issue arises in the future, MPS may wish to consider developing definitions for reliability and economic upgrades. Similarly, MPS may wish to consider developing some criteria for the determination of beneficiaries if there are disputes over beneficiary designation. Finally, as set forth in the MPUC's draft final report on alternatives to ISO-NE,<sup>4</sup> a "beneficiaries pay" cost allocation scheme should be applicable to both economic and reliability projects to limit disincentives to building transmission in Northern Maine. To the extent that cost allocation is renegotiated in New England prior to the expiration of the Transmission Operating

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<sup>4</sup> The draft report can be found at [http://www.maine.gov/mpuc/staying\\_informed/hot\\_topics.html](http://www.maine.gov/mpuc/staying_informed/hot_topics.html).

Agreement in 2010, the work done in New England may be a useful model for MPS. The value of this approach would be enhanced if MPS is interconnected to the ISO-NE region.

**V. CONCLUSION**

For the reasons stated hereinabove, the MPUC requests that the Commission direct that MPS further refine the dispute resolution provisions of its Attachment R consistent with the comments set forth herein.

Dated: January 7, 2008

Respectfully submitted,

/s/ Lisa S. Gast

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding either by U.S. Mail or electronic service, as appropriate. Dated at Washington, D.C., this 7<sup>th</sup> day of January 2008.

/s/ Harry A. Dupre  
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